

President Yugoslav tribunal issues direction on designation of enforcement state

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and the victim to testify again.

Under the tribunal's rules of evidence, the victim's testimony need not be corroborated. Since the rape occurred during a war, in most cases the defendant cannot use the defense of consent.

According to Misetic, his client was not in the room during the first rape and that the troubled victim was manipulated into identifying him by others who wanted to settle scores.

According to Brenda Hollis, the prosecutor on loan from the U.S. military, the defense was duly informed of the victim's counseling and heard a physician and the victim herself testify about her symptoms. The psychologist's statement was not disclosed because "it would be a gross invasion of privacy." Her post-traumatic stress syndrome does not change the integrity of her testimony.

Eventually Florence Mumba, a jurist from Zambia presiding at the trial, overruled the prosecutor's argument for privacy and ordered that all relevant medical documents be handed over to the defense. She ordered the reopening of the trial. The trial is expected to resume in September. Most likely, the victim will be required to return to the tribunal to undergo additional cross-examination.

The case demonstrates the difficulty of striking the proper balance between the right of the accused to a fair and public trial and the right of a rape victim to privacy. ⁷¹

4. Summary and Conclusion

In the aftermath of the isolation of the U.S. following the Rome conference vote on the Permanent International Criminal Court (PICC), the shock of the Clinton Administration over the vote, and hostility in the Senate Foreign Relations Committee towards the PICC, concern exists regarding the overwhelming U.S. support for the former Yugoslav tribunal, which an undersupplied and sometimes beleaguered tribunal depends heavily, may suffer.⁸¹

B. President Yugoslav Tribunal Issues Direction on Designation of Enforcement State

By André Klip^{*}

The President of the International Criminal Tribunal for the Former Yugoslavia, Gabrielle Kirk McDonald, issued a *practice direction on the procedure for the international tribunal's designation of the state in which a convicted person is to serve his/her sentence on imprisonment* on 9 July 1998. The Direction is reproduced in full text. A comment to this direction follows below.

⁷¹ *Id.*

⁸¹ Trueheart, *supra*.

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1. *Introduction*

In accordance with Rule 19(B) of the Rules of Procedure and Evidence, pursuant to Article 27 of the Statute and Rule 103(A) of the Rules of Procedure and Evidence, considering Article 2 paragraph 1 of the Model Agreement on the Enforcement of Sentences and having consulted with the Bureau, the Registrar and the Prosecutor, I issue this practice Direction in order to establish an internal procedure for the International Tribunal's designation of the State in which a convicted person is to serve his/her sentence of imprisonment:

2. *Procedure*

After the sentence of the convicted person has become final, the Registrar of the International Tribunal shall make a preliminary inquiry of the States that, pursuant to Article 27 of the Statute, have declared their willingness to accept convicted persons and have signed an agreement with the International Tribunal to that effect. The Registrar will ask the Governments concerned to give, before a certain date, a preliminary indication on their preparedness to carry out the sentence of the convicted person. The Registrar shall provide the following documents with the inquiry:

- a) a certified copy of the judgement;
- b) a statement indicating how much of the sentence has already been served, including information on pre-trial detention;
- c) any other documents of relevance.

On the basis of the Governments' indications on their willingness to accept the convicted person, the Registrar shall prepare a confidential memorandum for the President of the International Tribunal. This memorandum will enumerate the States in which the sentence of the convicted person can be carried out and shall contain information concerning:

- a) the convicted person's marital status, his/her dependants and other family relations, their usual place of residence and, when appropriate, the financial resources they have available to visit the convicted person;
- b) whether the convicted person is expected to serve as a witness in further proceedings of the International Tribunal;
- c) whether the convicted person is expected to be relocated as a witness and, in such case, which States have entered into relocation agreements with the International Tribunal;
- d) when appropriate, any medical or psychological reports on the convicted person;
- e) linguistic skills of the convicted person;
- f) if possible, general conditions of imprisonment and rules governing security and liberty in the State concerned;
- g) any other considerations related to the case.

The President of the International Tribunal will, on basis of the submitted information and on any other inquiries he/she chooses to make, determine the State in which imprisonment is to be served. Particular consideration shall be given to the proximity to the convicted person's relations. Before deciding the matter, the President may consult with the Sentencing Chamber or with its Presiding Judge. The President may, furthermore, request the opinion of the convicted person and/or of the International Tribunal's Office of the Prosecutor.

The President shall transmit the decision to the Registrar. The President may decide that the designation of the State shall not be made public.



3. *Request to the Designated State*

The Registrar shall, in accordance with the relevant provisions of the agreement on the enforcement of sentences between the International Tribunal and the State that has been determined by the President, request the Government of that State to enforce the sentence of the convicted person. The request shall be signed by both the Registrar and the President.

4. *Notification of the Adopted Decision*

If the requested Government, after the request had been decided upon in accordance with national law, accepts the International Tribunal's request to receive the convicted person, the Registrar will notify the President and, when appropriate, the Sentencing Chamber or its Presiding Judge accordingly. The Registrar will furthermore inform the convicted person of the State that has been designated, the contents of the agreement on the enforcement of sentences between the International Tribunal and the State concerned, and on any other issues of relevance for the matter.

5. *Referral to the President*

If the requested Government, after the request has been decided upon in accordance with national law, rejects the International Tribunal's request to enforce the sentence of the convicted person, the Registrar shall refer the issue to the President, who will designate another State in accordance with paragraph 4 of this Practice Direction."

6. *Comment*

This direction builds upon the enforcement agreements concluded with Italy on 6 February 1997¹⁹, Finland on 7 May 1997 and recently with Norway on 24 April 1998²⁰, as well as the Erdemovic decision of 29 November 1996 of the Tribunal. It demonstrates the developments in "the law of the tribunal". It confirms that the judges of the Tribunal consider an agreement with the Tribunal on the enforcement of sentences as a condition for designation of a state as an enforcing state. This means that the notification to the Security Council as meant in article 27 of the Statute as a state willing to enforce the sentence imposed by the Tribunal is not enough to be designated.

It is inevitable that the procedure chosen in the direction and agreements will be time-consuming. This may however lead to new legal questions regarding convicted persons who have spent so many years in detention on remand that, when they are finally convicted, there is not much left to enforce any more. The statute of the Tribunal does not provide for the enforcement of sentences by the Tribunal itself, but for detention on remand during the trial only. Also on 9 July 1998, the judges of the Tribunal have abolished the division between the decision on guilt and the decision on the sentence. Trial Chambers will now render one combined judgment, not only determining whether the accused is innocent or guilty but also, if the accused is found guilty of some or all of the charges brought against him, imposing sentence. This procedure, very well known in civil law countries in which the judges are triers of fact and law, may be rather strange for those educated in common law.

The Trial Chamber will thus impose a sentence on the convicted person without knowing in which state this sentence will be enforced. The Tribunal seems to neglect the fact that the enforcement of the same sentence in

¹⁹ See André Klip, *Italy and United Nations Conclude Enforcement Agreement*, 13 INT'L ENFORCEMENT L. REP. 286-289.

²⁰ See Bulletin 21 of 27 July 1998 of the INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.



one state or another may amount to unequal treatment. The designation of the enforcement state is of great significance. It determines the detention regime, the political surrounding of the prisoner, the question of whether conversion or continued enforcement of the sentence applies, parole policy, distance to the former Yugoslavia, whether credit will be given for detention on remand, and the applicability of international supervisory human rights mechanisms. In my opinion these factors are of such an importance that they should be taken into consideration *in determining the sentence.*³¹

It was wise to take into consideration whether the convicted person is expected to serve as a witness in further proceedings of the International Tribunal. Although thus far neither the Model Agreement nor the three existing Enforcement Agreements referred to that situation, it is very useful for other proceedings than those against the convicted person.

The opinion of the convicted person on the state to be designated as enforcement state may be requested. It is neither clear why this is optional, nor apparent in which situation the convicted person will be asked to give his opinion. It would certainly not harm the internal designation procedure of the state of enforcement if the convicted person was always in the position to give his views on these states. This does not mean that the Tribunal should follow the preferences of the convicted person.

XI. VICTIMS RIGHTS AND LAW OF WAR (HOLOCAUST)

A. Swiss Holocaust Settlement Focuses Attention to German Banks and Companies

The announcement on August 13, 1998 of a settlement between Holocaust victims and Swiss banks focused attention to the German banks and companies and the effort by victims and their heirs to obtain payment from those commercial entities.³²

1. Banks

At present Deutsche Bank and Dresdner Bank, Germany's two largest banks, are defendants in the U.S. over allegations they profited from gold taken from Nazi victims. While the case against the Swiss banks concerns unclaimed accounts, the lawsuit against German banks concerns allegations they had profited from gold taken from Nazi victims. Plaintiffs claim the two banks benefited from transactions undertaken in the course of "Arianization" of Jewish businesses, when companies and assets held by clients were expropriated and the financial proceeds transferred to the German central bank.

A team of historians hired by the Deutsche Bank recently confirmed the bank had profited from gold taken by Holocaust victims, but could not determine whether bank executives knew of the origin of the gold.

Already this year the Deutsche Bank donated DM5.6 million (\$3.1 million) to Jewish foundations as the proceeds from the 1995 sale of gold it possessed at the end of World War II, which may have been stolen from

³¹ See André Klip, *Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 144-164 (1997).

³² Andrew Fisher, *Nazi Gold Spotlight Switches to German Banks*, FIN. TIMES, Aug. 21, 1998, at 4, col. 1.